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No. 02-371

IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

vs.

KEVIN LAMONT HICKS,

Respondent.

On Writ of Certiorari to the Supreme Court of Virginia

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. May a public housing project exclude from formerly public streets, abandoned by the city and now owned by the project, persons with no legitimate business on project property?

2. May the policy of exclusion be implemented with discretion in the project managers to decide when access by nonresidents is compatible with the best interests of the project residents?

3. Do the answers to Questions 1 and 2 depend on whether the streets have lost their status as "public forum" property?

4. If the trespass policy is invalid in some applications, is it void in its entirety?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to criminal justice in order to protect and advance the rights of victims of crime and the law-abiding public.

The opinion of the Virginia Supreme Court in the present case threatens the ability of public housing authorities to protect some of the most vulnerable people in America from the domination of violent, drug-dealing criminal gangs. The state court reached this result in an opinion which seriously misunderstands and misstates this Court's First Amendment jurispru-

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

dence. Genuine freedom of speech can be fully protected with far less violence to the state's ability to protect the residents of public housing. The state court's unnecessary hindrance of that ability is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Whitcomb Court is a public housing development owned by the Richmond Redevelopment and Housing Authority (RRHA). To improve the safety of Whitcomb Court, RRHA and the City of Richmond attempted to "privatize" the streets surrounding and adjacent to the project. *Hicks* v. *Commonwealth*, 36 Va. App. 49, 52, 548 S. E. 2d 249, 251 (2001). The city adopted an ordinance deeding the streets to RRHA. *Id.*, at 52-53, 548 S. E. 2d, at 251. The ordinance provided that those streets were to be closed to public use and travel. *Id.*, at 52, 548 S. E. 2d, at 251. Although those streets and sidewalks were not physically blocked off and remained open to vehicular and pedestrian traffic, "private property, no trespass" signs were posted every 100 feet on each block. *Id.*, at 53, 548 S. E. 2d, at 251. After the streets were deeded, RRHA adopted a "barment-trespass procedure" to keep "unauthorized persons" from entering Whitcomb Court property. *Ibid.* This policy authorized sworn city police officers to enforce Virginia's trespass laws on the deeded streets against unauthorized persons. *Id.*, at 53, 548 S. E. 2d, at 251-252. Authorized persons include residents, employees of Whitcomb Court, and those who can "demonstrate a legitimate business or social purpose for being on the premises." *Id.*, at 53, 548 S. E. 2d, at 252.

In 1998, the defendant, Kevin Hicks, had been banned from Whitcomb Court property after being twice convicted of trespassing and of damaging Whitcomb Court property. *Id.*, at 54, 548 S. E. 2d, at 252. In January 1999, Hicks was seen on one of the "privatized" streets adjacent to Whitcomb Court and was cited for trespassing. *Ibid.* He was later convicted of the charge in general district court. *Id.*, at 55, 548 S. E. 2d, at 252.

Hicks appealed to the circuit court of the City of Richmond and filed a motion to dismiss the trespass charge on the ground that RRHA's trespass policy violated the First and Fourteenth Amendments. *Ibid.* The circuit court denied the motion and found Hicks guilty of trespass. *Ibid.*

Hicks appealed the judgment to the Virginia Court of Appeals. *Commonwealth* v. *Hicks*, 264 Va. 48, 51, 563 S. E. 2d 674, 676 (2002). A panel of the Court of Appeals affirmed the judgment, but the court en banc reversed, holding that the streets remained public forums, and that RRHA's trespass policy violated the First and Fourteenth Amendments as applied to public forum property. *Ibid.* The Virginia Supreme Court affirmed on the basis that RRHA's trespass policy was overly broad, without resolving the public forum status of the streets. *Id.*, at 60, 563 S. E. 2d, at 681.

This Court granted Virginia's certiorari petition on January 24, 2003.

SUMMARY OF ARGUMENT

The Virginia Court of Appeals in the present case asked the correct question and narrowly divided on the answer. The critical question is whether the City of Richmond successfully terminated the "public forum" status of the streets in question. The Virginia Supreme Court's decision that the trespass policy is invalid regardless of whether the streets are a public forum is not a "narrow" decision, as the opinion claims, but rather is a broad, damaging, and incorrect decision.

Crime in public housing projects today devastates the lives of those who must live there. The efforts undertaken by public housing authorities to protect the residents from crime are vitally important, and any proposed rule which would interfere with those efforts, such as the one adopted by the Virginia Supreme Court in the present case, requires the closest scrutiny.

The Virginia Supreme Court has confused the overbreadth doctrine with the vagueness doctrine. Overbreadth as such is not a constitutional defect, but rather the basis for holding a statute void in its entirety when it has some valid applications and some invalid applications. The overbreadth doctrine should not be applied when the chilling effect on protected speech can be eliminated by cleanly severing the valid from the invalid applications. If any of the property of Whitcomb Court is found to be a public forum, the trespass policy should remain in effect for the nonpublic portion, just as the statute at issue in *United States* v. *Grace* remains in effect for all of the grounds of this Court except the sidewalks adjacent to the public streets.

The "excessive discretion" line of cases does not apply to nonpublic forum property. This is the heart of the distinction between public and nonpublic forums. The Virginia Supreme Court's holding that it can resolve this point without deciding whether the property is a public forum disregards the clear holdings of this line of cases. While the discretion to exclude speakers from a nonpublic forum has limits, and the application of the discretion may be subject to judicial scrutiny, the existence of such discretion does not make the trespass policy invalid and does not support a facial challenge.

ARGUMENT

The Virginia Court of Appeals en banc asked the correct question and divided 6-5 on the answer. The key question is whether the City of Richmond had successfully transformed the streets in question from a public forum to a nonpublic forum. On the particular facts of this case, the majority thought it had not, *Commonwealth* v. *Hicks*, 36 Va. App. 49, 59, 548 S. E. 2d 249, 254 (2001), but the five dissenting judges thought it had. *Id.*, at 70, 548 S. E. 2d, at 260 (Humphreys, J., dissenting). The narrow division on the public forum question is not surprising, as this issue has proven difficult in borderline cases. See *United States* v. *Kokinda*, 497 U. S. 720 (1990) (no majority

opinion); *Lee* v. *International Soc. for Krishna Consciousness, Inc.*, 505 U. S. 830 (1992) (*per curiam* decision without opinion, disparate separate opinions). If the majority is correct, then the defendant has a substantial argument for the invalidity of the trespass policy *as applied to the streets* under *Chicago* v. *Morales*, 527 U. S. 41 (1999) and *United States* v. *Grace*, 461 U. S. 171 (1983). However, the Court of Appeals distinguished its own prior decisions and a decision of the Eleventh Circuit regarding similar policies on *nonpublic* housing authority property, see 36 Va. App., at 59-60, 548 S. E. 2d, at 254-255, so that its decision did not threaten the ability of public housing authorities to enforce such policies in most situations.

If the Virginia Supreme Court had affirmed on the same basis, this case, although important, would have been too narrow and too fact-specific to have met the criteria for review on writ of certiorari in this Court. See Supreme Court Rule 10.1. Instead, the state high court declared that the trespass policy was invalid *regardless* of whether the property was a public forum or a nonpublic forum, astonishingly declaring this to be a "narrow" decision. See *Commonwealth* v. *Hicks*, 264 Va. 48, 60, 563 S. E. 2d 674, 681 (2002). In so holding, the Virginia Supreme Court confused the overbreadth doctrine with the "unfettered discretion" cases, ignored the explicit holding of this Court's landmark case on forum analysis, and seriously impaired the ability of the government to protect its poorest citizens from the scourge of crime.

I. Protecting the residents of public housing projects from crime is a compelling interest and requires strong action.

Criminal activity in public housing communities is running rampant and constitutes an enormous problem throughout the nation. Residents of public housing developments are in continual fear of being the next victim in the constant stream of

criminal activity that takes place right before their eyes every day. For example, in Tennessee,

> "Nashville teenager, Eric Harvey Hazelitt, was fatally shot in the chest when gunfire erupted at the John Henry Hale public housing complex in Nashville. Just 14 years old, Hazelitt was often seen riding his bike, helping older neighbors shop, or emptying the trash. Witnesses said Hazelitt got caught in the crossfire of two groups shooting at each other." See U. S. Dept. of Housing and Urban Development, In the Crossfire: The Impact of Gun Violence on Public Housing Communities 34 (c. 2000) ("In the Crossfire").

In Virginia, "[a] woman was shot in the head and killed at the Gilpin Court public housing development while standing next to a pay telephone." *Id.*, at 35. In Washington, D.C.,

> "[a] 55-year-old grandmother, Helen Foster-El, was gunned down by two stray bullets fired by feuding young men as she tried to usher neighborhood children to safety. Parents in the East Capitol Dwellings public housing development said they give their children survival instructions on what to do when shooting erupts, because it happens so often." *Id.*, at 31.

Finally, in Maryland, "Byron Antoine Jones, 22, was fatally shot near the front stoop of his girlfriend's Annapolis Gardens duplex. The shooting at the public housing community was apparently the result of an earlier altercation at Club Hollywood, a nearby nightclub." *Id.*, at 32.

Drug trafficking, gang activity, prostitution, assaults, rapes, burglaries, and the constant sound of random gunfire are but a few examples of what public housing residents must face every day. Most of this criminal activity is the responsibility of nonresidents who effectively make residents prisoners in their own homes out of fear. See U. S. Dept. of Justice, Office of Justice Programs, National Institute of Justice, Research in brief, B. Webster & E. Connors, The Police, Drugs, and Public Housing 1 (June 1992) ("Webster & Connors"); see also U. S. Dept. of Housing and Urban Development, One Strike and You're Out Policy in Public Housing 11 (March 1996).

"In 1998, there were an estimated 360 gun-related homicides in 66 of the Nation's 100 largest public housing authorities—*an average of nearly one gun-related homicide per day.*" In the Crossfire, *supra*, at 2 (emphasis added). In some developments, preschool-aged children have learned not to enter open areas where shootings commonly occur and to "hit the ground" when gunfire erupts. Popkin, *et al.*, Sweeping Out Drugs and Crime: Residents' Views of the Chicago Housing Authority's Public Housing Drug Elimination Program, 41 Crime & Delinquency 73, 75 (1995). Even more disturbing, in the first six months of 1999, 559 public housing authorities reported that 423 homicides, 1,610 rapes, 8,382 robberies, 20,766 aggravated assaults, 28,777 burglaries, 19,254 auto thefts, and 7,007 weapons violations occurred on housing authority grounds. In the Crossfire, *supra*, at 16-17.

Drug trafficking is another critical problem public housing communities must face on a daily basis. Nonresident drug buyers drive in at all hours of the day and night to make drug purchases, and nonresident drug sellers take over vacant units or illegally commandeer units of existing residents to "set up shop." Webster & Connors, *supra*, at 1. In the past, to evade physical harassment from gang members, some existing residents were compelled to allow gang members to hide their drugs in their apartments in exchange for a small monthly payment. S. Venkatesh, American Project, The Rise and Fall of a Modern Ghetto 146 (2000). Further, gangs generally overtook the public space in the communities to conduct drug deals, hold meetings, and survey the area for the police and rival gang members. *Id.*, at 177. Leaders in the gang communities would periodically stop residents, question where they had been, frisk them, and occasionally physically prevent them from entering the building. See *ibid.*

"In addition to serious crime and drug trafficking, residents must cope every day with darkened hallways, abandoned apartments, graffiti, trash, and street prostitution. Such visible disorder breeds fear, undermines social cohesion, and promotes crime and economic decay." Popkin, 41 Crime & Delinquency, at 75. Most people take for granted the sense of security that they feel in their own homes. Residents of public housing communities do not share that same sense of security. Instead, they live in terror on a regular basis. The constant threat of violence and the chronic fear of victimization also take a great toll on the mental health of public housing residents. Children are at high risk for psychological trauma and intellectual defects, and adults often suffer from severe depression, hopelessness, and a lack of motivation. *Ibid.*

Several federal, state, and local initiatives have been implemented in an effort to decrease crime rates in public housing communities. For example, the United States Department of Housing and Urban Development (HUD) has implemented several anti-crime and anti-violence measures in public housing communities over the past several years. This Court recently validated some of those efforts in *Department of Housing and Urban Development* v. *Rucker*, 535 U. S. 125, 136 (2002). Local leaders have also attempted to reduce crime by changing the physical layout of public housing communities. See U. S. Department of Housing and Urban Development, H. Cisneros, Defensible Space: Deterring Crime and Building Community 9-13 (February 1995). Because "[d]isputes are much more likely to end in a shooting or killing and to involve innocent bystanders," Popkin, 41 Crime & Delinquency, at 75, altering the physical design of the community makes it more difficult for nonresidents to cause such disputes on public housing grounds.

All these efforts illustrate that states have a compelling interest in preventing, controlling and combating crime in public housing developments. Law-abiding residents of these communities should not be forced to endure the anxiety and

sense of helplessness in the place that they call home. Behind the lofty, dry abstractions of First Amendment jurisprudence in this case lie the real lives and real deaths of real people. Any call for a court-created rule that would impair the housing authority's ability to protect the residents, such as the rule created by the Virginia Supreme Court in the present case, requires the most careful scrutiny.

II. "Overbreadth" should be applied only if applications of a statute are invalid for another reason, are substantial in scope, and are not cleanly severable.

In part III-B of its opinion, the Virginia Supreme Court addresses and accepts an argument "that the Housing Authority's trespass procedures are overly broad and, *therefore*, violate . . . the First Amendment . . . ." *Commonwealth* v. *Hicks*, 264 Va. 48, 54, 563 S. E. 2d 674, 678 (2002) (emphasis added). The court is confused. Overbreadth, as such, is not a ground for holding that a statute or other state action violates the First Amendment. Overbreadth is a basis for holding an enactment void in its entirety because a substantial portion of its operation violates First Amendment rights. In the typical case, the overbreadth doctrine is invoked to obtain standing for a challenger whose own action the state could legitimately proscribe. The statute is invalidated in its entirety, thus overturning the conviction of the person bringing the challenge, because "the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick* v. *Oklahoma*, 413 U. S. 601, 612 (1973); *Hill* v. *Colorado*, 530 U. S. 703, 731-732 (2000). Occasionally, a party who wishes to engage in both protected and unprotected speech may invoke the overbreadth doctrine to strike down an overly broad statute in both applications. See *Board of Trustees of State Univ. of N. Y.* v. *Fox*, 492 U. S. 469, 484 (1989). Either way, there must *first* be substantial areas of application of the statute which are unconstitutional for some

other reason before the overbreadth doctrine can apply. Breadth as such is "not . . . a constitutional defect." *Hill*, *supra*, at 730.

The Virginia Supreme Court has confused the overbreadth doctrine with the vagueness doctrine. While both of these principles are invoked to attack imprecise laws, they are nonetheless distinct. See *Chicago* v. *Morales*, 527 U. S. 41, 52 (1989) (plurality opinion).

> "First, the overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when 'judged in relation to the statute's plainly legitimate sweep.' *Broadrick* v. *Oklahoma*, 413 U. S. 601, 612-615 (1973). Second, even if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests. *Kolender* v. *Lawson*, 461 U. S. 352, 358 (1983)." *Ibid.*

Unlike overbreadth, vagueness and excessive discretion in a licensing authority are, in themselves, constitutional defects. Many of the cases cited by the Virginia Supreme Court in its "overbreadth" analysis are actually from this distinct line of cases. See 264 Va., at 56-58, 563 S. E. 2d, at 679-680. In part III, *infra*, we will explain why this line of cases cannot be invoked without first deciding whether the streets in question remain a public forum. If they are not, then the trespass policy does not have any substantial applications which violate the First Amendment, and the overbreadth doctrine is inapplicable. However, if this Court should agree with the Court of Appeals majority on the public forum question, then it would be necessary to decide whether and to what extent to apply the overbreadth doctrine to invalidate the policy in otherwise constitutional areas of its application.

As this Court has stated many times, and as the Virginia Supreme Court recognized, "the overbreadth doctrine is 'strong medicine' and this doctrine should be employed 'sparingly and only as a last resort.' *Broadrick*, 413 U. S. at 613." *Id.*, at 56, 563 S. E. 2d, at 678. Indeed, several Justices of this Court have questioned whether the doctrine is even legitimate. See Brief for Criminal Justice Legal Foundation in *Virginia* v. *Black*, No. 01-1107, p. 5; see also *Morales*, 527 U. S., at 77 (Scalia, J., dissenting) ("declaring a statute to be void in all its applications [is] something we should not be doing in the first place"). Several limitations on the overbreadth doctrine have been stated explicitly in this Court's decisions, such as inapplicability to commercial speech, see *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 462-476, n. 20 (1978), less severe application to statutes which regulate conduct with an incidental effect on speech, as opposed to those that directly regulate expression, see *Broadrick*, 413 U. S., at 615, and the requirement that any overbreadth be substantial. See *ibid.* There is one more limitation which is especially pertinent to this case, however. Although not yet explicitly stated in an opinion of this Court, it is implicit in *United States* v. *Grace*, 461 U. S. 171 (1983).

Grace involved two federal statutes: 40 U. S. C. § 13k, which prohibits certain expressive activities on the Supreme Court's grounds, see 461 U. S., at 173, and n. 1, and 40 U. S. C. § 13p, which defines the grounds to include the sidewalks around the building. Justice Marshall, dissenting in part, would have held § 13k unconstitutional in its entirety. See 461 U. S., at 187. Anticipating *Fox*, *supra*, he would have applied the overbreadth doctrine even though the challenging party's own speech was constitutionally protected. See 461 U. S., at 187, n. 12. The majority, however, limited its holding to "the public sidewalks surrounding the building" and held only that "under the First Amendment the section is unconstitutional as applied to those sidewalks." *Id.*, at 183. An argument made by the dissent and not addressed by the majority is implicitly rejected by the majority. *Clemons* v. *Mississippi*, 494 U. S. 738, 747-748, n. 3 (1990). However, none of the limita-

tions on the overbreadth doctrine explicitly stated in this Court's opinions, and discussed above, applies. The speech in question is not commercial, the statute is directed squarely at expression, and the invalid applications are substantial. There must be another limitation on overbreadth to explain this result.

Grace's implicit limitation, *amicus* submits, goes back to the purpose of the overbreadth doctrine, as stated in *Broadrick*, *supra*. A statute which is overbroad on its face, with substantial invalid applications, ceases to have a chilling effect when it has been definitively struck down as invalidly applied, provided the line between the valid and the invalid applications is reasonably clear. After this Court's decision in *Grace*, demonstrators knew they could express themselves on the sidewalk adjacent to the street. The continuing valid applications of the statute to prohibit, *e.g.*, parading inside the building during oral argument, present no threat to genuine First Amendment liberty.

As we explain in part III, *infra*, the RRHA's trespass policy is perfectly valid as applied to nonpublic forum property. If Whitcomb Court is found to include both public and nonpublic areas, the policy should remain in force for the nonpublic forum areas, just as the statute did in *Grace*.

III. The "unfettered discretion" cases have no application to government-owned property which is not a public forum.

The Virginia Supreme Court's opinion in the present case states that it did not need to resolve whether the streets in question remain a public forum in order to decide the "unfettered discretion" question. See *Commonwealth* v. *Hicks*, 264 Va. 48, 60, 563 S. E. 2d 674, 681 (2002). This statement is puzzling, to put it mildly. This Court's landmark precedent on forum analysis makes crystal clear that the governing rules are quite different for public and nonpublic forums.

> "Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property." *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 49 (1983).

This Court has recognized the distinction several times since *Perry*. "The government can restrict access to a nonpublic forum 'as long as the restrictions are reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view.' " *Arkansas Ed. Television Comm'n* v. *Forbes*, 523 U. S. 666, 677-678 (1998) (quoting *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 800 (1985)); see also *United States* v. *Albertini*, 472 U. S. 675, 686 (1985) (rejecting "standardless discretion" claim; Hickam Air Force Base not a public forum).

As *Forbes* illustrates, the government's ability to exercise discretion in access goes to the very heart of the distinction between nonpublic forums and public forums, whether traditional or designated. In that case, the question was whether a candidate debate on public television "was a designated public forum or a nonpublic forum." 523 U. S., at 678. The difference is that the nonpublic forum allows the government to make "individual non-ministerial judgments as to . . . [who] will participate." *Id.*, at 680 (citing *Cornelius*, *supra*). These "non-ministerial judgments" that are essential to the operation of a nonpublic forum are precisely what the "excessive discretion" cases forbid in a public forum. In *Forsyth County* v. *Nationalist Movement*, 505 U. S. 123, 133 (1992), even the discretion to set a fee for a permit was deemed intolerable. The difference between *Forbes*, where a government actor had broad discretion to completely exclude a speaker, and *Forsyth County*, where a government actor could not even be allowed discretion to set a fee, is in the type of forum. *Forbes* involved a nonpublic

forum, while *Forsyth County* involved "public speaking, parades, or assemblies in 'the archetype of a traditional public forum.' " 505 U. S., at 130 (quoting *Frisby* v. *Schultz*, 487 U. S. 474, 480 (1988)).

When the challenging party invokes the "excessive discretion" cases, and the government disputes the public forum status of the property, that status must be resolved before those cases can be applied. If the government property is not a public forum, either traditional or designated, the fact that responsible officials exercise discretion regarding access to the property is not a constitutional defect. The discretion is not unlimited. It must be exercised reasonably and not for the purpose of suppressing a viewpoint merely because the official disagrees with it. See *International Soc. for Krishna Consciousness, Inc.* v. *Lee*, 505 U. S. 672, 687 (1992) (opinion of O'Connor, J.). However, the law that confers the discretion is valid, and a facial attack on it fails.

CONCLUSION

To the extent it forbids the exercise of discretion regarding nonresidents' access to housing project property which is not a public forum, the decision of the Virginia Supreme Court should be reversed.

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